DOCUMENT RESUME

ED 235 456 CG 400 180

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TITLE Preparing School Psychologists to Testify at Due Process Hearings.
PUB DATE Aug 83
NOTE 31p.; Paper presented at the Annual Convention of the American Psychological Association (91st, Anaheim, CA, August 26-30, 1983).
PUB TYPE Guides - Non-Classroom Use (055) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Due Process; Elementary Secondary Education; Guidelines; *Hearings; Lawyers; Legal Responsibility; Planning; Psychological Evaluation; *School Psychologists; *Special Education
IDENTIFIERS *Forensic Psychology; PF Project; *Testimony

ABSTRACT

Guidelines are presented for school psychologists in order to make their testimony at special education due process hearings as effective as possible. Recommendations are offered to prepare the school psychologist to: (1) accept the role of expert witness; (2) organize and review case materials; (3) state relevant rules, procedures, and criteria; (4) review testing procedures and conclusions and be prepared for cross-examination; (5) interact with school board attorneys in the development of testimony; (6) testify calmly, professionally, clearly, and without jargon; and (7) use sound psychological techniques which will stand up to scrutiny. The guidelines are illustrated with excerpts from courtroom transcripts which demonstrate both desirable and undesirable behaviors. The conclusion lists seven guidelines to be followed in day-to-day practice so that the school psychologist will be prepared in advance if a case is brought to a due process hearing. (DC)

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Preparing School Psychologists to Testify at Due Process Hearings

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Presented at the 1983 Annual Convention
of the American Psychological Association
Anaheim, California

August, 1983

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INTRODUCTION

Increasing numbers of school psychologists are being requested to testify, for school boards or parents, at due process hearings. This is probably the most substantial impact P.L. 94-142 has had on the role of the school psychologist. Eighty percent of the due process hearing requests which The Dade County Public Schools has had since 1978-79 have involved psychological consultation and/or testimony for the school system.

This manual is intended to assist the school psychologist to prepare for testifying at a due process hearing. It uses suggestions from the forensic psychology literature as well as illustrative examples from hearings which have been held in Dade County. The excerpts are taken directly from hearing transcripts and have not been edited for style or grammar. The goals of the manual are as follows:

Goal 1:

The school psychologist will be prepared to accept the role of expert witness.

Goal 2:

The school psychologist will be prepared to organize and review case materials for hearing purposes.

Goal 3:

The school psychologist will be prepared to state relevant criteria, rules and educational procedures.

Goal 4:

The school psychologist will review testing procedures and conclusions and be prepared for cross examination on these matters.

Goal 5:

The school psychologist will be prepared to interact with school board attorneys in the development of testimony.

Goal 6:

The school psychologist will be prepared to testify in a calm professional manner, speaking clearly and without jargon.

Goal 7:

The school psychologist will be prepared to use sound psychological techniques which will stand up to potential due process scrutiny.

What a Due Process Hearing is:

A due process hearing provides a mechanism for resolving disagreements between the parents and the local education agency (LEA) in matters relating to the student's educational program or the provision of a Free Appropriate Public Education (FAPE) for the student. A hearing is the final recourse when there is a disagreement or impasse between parents and the LEA. Hearings may be requested by parents, guardians, the LEA, or any other person or agency who has legal responsibility for the student.

A hearing is an administrative procedure which is formal in nature. It is conducted by an impartial hearing officer. The hearing officer must look at the record, listen to testimony, examine the evidence, and then make a fair and impartial decision as to the appropriateness of the educational program or services offered to the student.

The party that has requested or initiated the hearing is known as the petitioner and the responding party is known as the respondent. Both the petitioner and respondent may present evidence and witnesses, and may confront and cross-examine witnesses, in an attempt to weaken evidence presented by the other party. Both parties may be represented by legal counsel at the hearing. (State of Florida, 1982)

Why School Psychologists are used as Witnesses:

Eighty percent of the due process hearing requests which The Dade County Public Schools has had since 1978-79 have involved psychological consultation and/or testimony for the school system. Most hearings concern diagnostic and placement issues which require psychological testimony. Parents are likely to present independent psychological witnesses to support their position and the school district must respond to this testimony as well as demonstrate that appropriate diagnostic and placement procedures were followed.

On occasion, school psychologists are called by parents to testify against the school district. This will generally occur when the parents are aware that the psychologist's placement opinion differs from that which was agreed upon by the M-Team. This may also occur when the parents wish to dispute diagnostic techniques or findings and call the psychologist as their witness to assure that he or she will testify.

When any school board employee is called upon to present an opinion which differs from that of the school system they should be free from repercussions to their job. The American Psychological Association's Draft White Paper on P.L. 94-142 has recommended that a section be added to the regulations which would guarantee that psychologists and other personnel are protected from retaliation when operating in accordance with professional standards and ethics.

The expert witness role:

An expert witness is a person who, because of education or specialized experience, possesses knowledge about a subject beyond the ordinary person. All witnesses can testify about facts of which they are aware. The expert

witness can go beyond this and give opinions and conclusions in the area of her expertise. The hearing officer will determine if any witness is an "expert". In most cases school psychologists will be considered experts in diagnostic testing for educational purposes. They will not be considered experts in curriculum or clinical psychology without appropriate experience and training in these fields.

School psychologists should be willing to take an expert witness role and testify to their opinions and conclusions. Some may wish to testify only to their direct observations and testing results without stating their interpretations and conclusions. This posture is difficult to maintain in a hearing and also may be avoiding a fundamental responsibility (Garlow, 1975). Being an expert involves being aware of professional issues and literature. It requires review of the data and supporting materials for conclusions which were drawn. The more prepared the witness is, the greater is his or her confidence and ability to present testimony in a clear and organized fashion.

Hearing excerpt 1 illustrates testimony of a person without expert status and the limits placed on his testimony.

Hearing excerpt 1 - Direct and redirect examination of a mental health technician called by parents.

Direct Testimony

Q (by parent) What is your educational background?

A I have an associate degree in psychology from Miami-Dade and a bachelor's degree from Barry College.

Q What is your bachelor's degree?

A Professional studies with concentration in social psychology.

Q What has your work experience been in the area that led to your job?

A I have two years of experience working with adult psychiatric patients and six more years working with adolescent patients.

Redirect Testimony

(parent) Would his psychological disorder be a composite of several different problems versus just one?

(school attorney) Let me object. I think, again, you are asking for an expert opinion.

If you are asking him what is in the records or what was discussed in the group, that's one thing, but you are asking him to give an expert opinion again.

(parent) Your question, as I remember it, was what he saw (the child's) psychological problem to be, and his response was, a social aspect of his disorder.

Now, I am asking him in addition to that, are there other problems, many different problems, that go into this total makeup other than just the social disorder.

(school attorney) I didn't ask him what his opinion was, I don't think.

(parent) Could you read back and find out where that was.

(hearing officer) Okay.

(school attorney) I will withdraw my objection

(witness) Okay, Can I answer this or not?

(school attorney) I withdrew my objection, because you are asking for observations, not opinions.

(witness) Would I say that he had other problems that would--or--I am not sure

(parent) Are there many other--is there depression there, various other mental disorders also evidenced in him as well as the social--

(school attorney) He is asking what you have seen or what you have observed.

If you are going to give an opinion, then I will object again. But right now he is asking what you observed.

Hearing excerpt 2 illustrates limits placed on the expert witness status of a school psychologist when it comes to clinical judgement. This excerpt also illustrates the importance of direct observation of students in their classroom setting.

Hearing excerpt 2: Direct examination of a school psychologist by a school board attorney:

Q Do you know most of the children that are in that class?

A Yes, I do

Q Is (the student) more severely disturbed than the average child in there?

(parent) Objection. She is not qualified to make that determination.

(hearing officer) Okay. Rephrase.

Q Have you observed most of the children in that class?

A I have tested a great many of them, either through initial testing or through re-evaluation.

Q Do the results of (the students') testing, and your observations of him and the other children, would you say he is more disturbed than--

(parent 1) Objection. By her own testimony, she stated she never observed (the student) in class.

(parent 2) She is also not qualified to make a determination of how severe a child's emotional disturbance is. She is not--she doesn't have the credentials to do that. Only a clinical psychologist or a physician can do that.

(hearing officer) That is a matter of the weight to be ascribed to her testimony, given what her credentials are. She can testify, based upon test results, and compare him to--through his test results, to the other students in the class, whom she has tested, inasmuch as I understand her testimony to be that she hasn't actually observed (the student) in class.

Hearing excerpt 3 illustrates limits placed on the expert witness status of a school psychologist when it comes to medical judgement.

Hearing excerpt 3: Direct examination of a school psychologist by a school board attorney

Q Did you later on become aware of (the students') tics and hospitalization?

A Yes

Q Could you compare her tics to school phobia problems?

A The way the mother had--

(parent) I object, unless she can be qualified as an expert in tics. I don't think that she can give a basis for her answer.

(school attorney) I'm not asking her to say that tics derived from phobia. Maybe I can reword my question.

(four pages of attorney interchange about what the psychologist should be allowed to respond to.....)

Q (school attorney) Okay. The problems a child evidences, such as going home every other day or every day with stomach aches and being ill, is that parallel to children with school phobia problems?

A It could be.

Q What is school phobia?

PREPARATION

When a school psychologist learns that a case may go to due process the observations and evaluation of the student may have taken place recently or, more usually, months or even years previously. The following steps will help you to review the case in preparation for possible testimony.

Review of Case File:

These first series of steps are vital in determining the basis for your testimony. All involvement with the case should be covered, including test data, reports reviewed, observations, reports written and meetings attended.

Begin by reading all records for general familiarization. Next, develop a chronology of your total involvement with the case. The chronology should include dates of testing, observations and meetings and, to the best of your recollection, the actual amounts of time spent with the student.

Hearing excerpt 4 illustrates the type of questioning about contact time which a school psychologist may receive under cross examination.

> Hearing excerpt 4 - cross examination of a school psychologist by parents' attorney
>
> Q (by attorney for parents) You said you saw (the student); for how long a period of time that you personally saw him?
>
> A I personally saw him for two days.
>
> Q Out of the two days, how long a period of time did you administer these tests; you personally, not the team, your tests.
>
> A Let me think about that.
>
> I would say about six hours. I was also present in the room when some of the educational evaluation was done.
>
> Q I understand, but what I am talking about right now, your testing process. You are saying that the Wechsler and the various other tests -- I cannot read -- Bender and the House - Tree-Test, and the Bender; and what is this other one --
>
> A Leiter.
>
> Q The Wechsler and the Leiter, how long did those two combination test take?

A It is -- I am trying to be as accurate as possible.

Q I understand. I am not rushing you.

A I would say the entire battery of tests that I took -- I gave him -- was between five and six hours.

Q All right.

A The tests themselves do not take that length of time, but I spent time being with him, observing him, establishing rapport and interviewing him.

Q Okay. And your testimony is that you personally, as part of your testing process when administering tests and establishing rapport, you were in (the students') presence approximately five to six hours?

A Yes.

Q Had you previously seen him?

A No.

The next step is to review your report more thoroughly - outline all conclusions that you arrived at and go back to your original data to determine the elements which led to each statement. You may or may not have to use raw data at the hearing, but you should be prepared to discuss your report in detail. An outline along the lines of the following brief example has been found helpful:

STATEMENT	SOURCE
Displayed inappropriate affect	Frequent outburst of laughter for no apparent reason, laughed when telling about sister dying.
Shows auditory memory problems	ITPA (Aud memory) Detroit (AASUW, AASRS), had to have questions repeated.
Performance IQ a low estimate	Distractibility hurt on timed tasks.
Many friends in the community	Clinical interview, sentence completion.

The outline will be useful in preparing your testimony with the school board attorney and will make it easy for you to review quickly before the hearing.

You may come across a statement that you find hard to support now that you are reviewing for a hearing. This will happen most generally when you use information from other sources without a thorough check or without crediting your source (i.e. - "John has many friends in the community" - rather than "John stated that he had many friends in the community.") These may be embarrassing if your statement is not factual but, at least, you can document where you obtained the information.

Even more likely, you may find statements that will be hard to justify to a hearing officer because of the technicality of your data source. This is especially true when the source was projective testing. If you have said that the student has sex role confusion because he drew a female figure first on the HTP, you will need to go further in your documentation efforts. Obtain reference citings, where available, and search your data for overt behaviors or other objective support of the statement.

Many attorneys are learning about techniques in coping with psychological testimony from books such as Ziskin, 1981. These attorneys may wish to delve into specifics of test data because of the difficulty in explanation to a lay audience. On the stand, you will wish to present a global picture from the total protocal. This does not eliminate the need to prepare an explanation for each statement.

In some cases, you may have specific examples that would obviously support your conclusion to most persons hearing them. The pros and cons of going into these specifics should be discussed with the attorney when your testimony is prepared. You will also want to discuss any elements of the report that you no longer agree with and any areas of potential problems in cross examination. Any report that is vulnerable for any reason should be made known to the school board attorney so that potential criticisms can be prepared for. It is better to look at your reports as they will appear to a knowledgeable outside professional and be ready for opposing testimony.

Look carefully at all of the tests and procedures used in your evaluation. In a complicated case you may find it beneficial to do a test outline similar to the one developed for your statements. Note the reason each test was selected and be able to compare the selected test to others which might have been chosen, or which may have been used by other evaluators testing this same child.

For each test, renew your familiarity with validity and reliability data, the normative group and specific recommended uses. Note if the test is recommended in the District Procedures manual. Recheck the scoring on all tests which may become part of the hearing record. Don't take the chance that an accidental error will first become known to you when you are being cross examined on the witness stand.

Gorlow (1975) states "school psychologists ought to persuade the hearing officer and other observers that they have full and professional familiarity with the instruments they employed in arriving at their recommendations. It is a matter of some distress to me to observe psychologists testifying about their findings without basic knowledge about the construction, standardization population, validity and reliability of the tests they used." (page 314)

As mentioned previously, attorneys are becoming familiar with the limitations of psychological testing. You will increase your credibility as a professional if you are aware of, and willing to discuss reasonably, the limitations on predictability or validity of the tests available for usage. This will indicate that you took these considerations into account when making your determinations about the student.

Hearing excerpt 5 illustrates the importance of reviewing your report in the development of your testimony. In this example, the witness is describing the student differently than was reflected in the report.

Hearing excerpt 5 - cross examination of an outside psychologist for the parents by school board attorney

A It may, yes. Yes. On the other hand, again, you know, granted, (the student's) inattention and inability to tolerate frustration, inability to even stay with answers, and her distractibility and her emotional concomitants and her physical movement. She's also restless. I mean, (student) is like a cerebral palsy child who doesn't seem to have cerebral palsy.

Q Then why wasn't she described that way during the testing situation? She didn't appear restless for seven hours of testing.

A Oh, I think she was very restless.

Q Then why isn't it in the report?

A She was restless--to answer that, (the student) wasn't seen for seven straight hours.

Q No. You said three and a half, and three and a half which is long in itself.

A I think--I think there were three settings, broken up entirely so. In the time that I saw (the student) she was very restless.

Q Why isn't it in the report?

A I'd like to look at that again. I don't believe that a crucial factor is whether (the student) was restless in a report or not.

Q Well, it goes to the believability of the report.

A Well, I would honestly say that if you would take the opinion that this report is totally inaccurate, and that the people who gave the report gave false or inaccurate--

Q I don't think your report is inaccurate. In fact, I tend to go along with the report, except that what you're saying today does not go along with your report, and that's what I'm questioning.

Hearing excerpt 6 is an example of an outside psychologist being asked to critique a school psychologist's data.

Hearing Excerpt 6 - direct examination of outside psychologist by parent's attorney

Q Now, Doctor, I am going to show you Plaintiffs' Exhibit No. 2 in (school psychologists') Deposition, which is her psychological evaluation. Also attached are some of the raw data she used, which you may not have seen, which I would like you to take a moment to look at the report and the raw data.

A Okay. Yes.

Q First, Doctor, I am going to ask you whether this report followed accepted psychologist's practice in 1974 in ruling out whether the child...is primarily a learning disabled problem?

A I would consider the testing inadequate. I would have liked to have seen the Illinois Test of Psycholinguistic Abilities, or a Detroit administered; and, as I said earlier, I would also have liked to have seen some other personality, such as the Rorshach or the Thematic Apperception test. However, the school may not require that.

Review terms, definitions and criteria:

School psychologists ought to be thoroughly familiar with relevant sections of the District Procedures Manual, State Board Rules and Federal Laws, including P.L. 94-142 (Garlow, 1975). If the hearing question relates to a students' eligibility for a learning disabilities program, you will be expected to quote the eligibility requirements and why the student did, or did not, meet them.

Terms such as "least restructive environment", "mainstreaming", "related services", and "full or part-time" are commonly used at hearings. Become familiar with the exact definitions of these and similar terms.

Be especially careful to review definitions of all terms or labels used in your report. For example, if you said the student appeared "hyperactive", "depressed", or "dyslexic", be able to formally define these terms and give examples and evidence to support your usage of them. For labels such as "learning disabilities", or "emotionally disturbed" use the definition in the State Board rules.

Hearing excerpts 7, 8, and 9, demonstrate the types of questions which will be asked relating to terms and criteria. All three examples are from the testimony of outside psychologists who were not familiar with the relevant term as used for educational purposes. This type of testimony should never occur while you are on the stand if you will follow the steps recommended above.

Hearing excerpt 7 - cross examination of a psychologist for the parents by school board attorney

Q What is your definition of seriously emotionally disturbed?

A Someone who is experiencing emotional problems to the degree that they require some type of psychiatric intervention or treatment.

I can't be specific, because that seems like a very wide range question. It's very difficulty to answer.

Hearing excerpt 8 - cross examination of a psychologist for the parents by school board attorney

Q Are you familiar with the concept of least restrictive environment?

A Yes, I am

Q And what does that mean?

A Well, basically, that the school district does not have to provide the very best possible school situation for a child, but one that would be appropriate.

Hearing excerpt 9 - cross examination of a psychologist for the parents by school board attorney

Q Are you familiar with the requirements for residential placement under the law of the State of Florida?

A No, I'm not.

Q Have you ever observed (the student) in her class at (school) in Miami, Florida?

A No, I have not.

Q Have you ever talked to (the student's) last year teacher?

A No.

Review Meetings Attended

The school psychologist is likely to be asked about IEP conferences, meetings with parents and teachers, as well as other services or activities related to the student in question. Review notes of these events. Add dates and outcomes to the case chronology.

The psychologist will probably not be the only person reviewing the case file. Administrative, instructional and placement personnel may be called as witnesses and all will want to refresh their memories about the case. Your chronology can be cross-referenced with other involved personnel to insure completeness and accuracy.

Review Other Evaluations and the Student's Current Status

Once you have reviewed your own case involvement it is important to obtain a thorough picture of evaluations and placements since that time. The student's current status is especially important.

You may have tested the student four years ago. However, several evaluations and placement changes may have occurred since them. It is easy to feel that you have little to testify about other than your own involvement at the time. Discuss this with the school board attorney (see the following section). The attorney may agree that your testimony should be limited to your own involvement. On the other hand, you may be needed to support decisions that were made subsequently or to compare your findings with later ones. Some examples might be:

- You found the student to be learning disabled and two newer evaluations support your conclusions. You may be asked to demonstrate the similarities in the findings. (The other psychologists involved may, or may not, be called for the same reasons).

- You stated that the student was not emotionally handicapped but two years later he stabbed a fellow student. How do you explain these facts?

- You found that the student's I.Q. scores fell in the retarded range but the placement committee determined the student was not eligible. How did this occur?

- You found that the student's I.Q. scores fell in the retarded range but the parents' psychologist used a different test and got a 75 I.Q. How did this occur?

- A student comes from New York with a diagnosis of learning disabilities but does not meet criteria in Florida. How do you explain this?

- You did not find evidence of emotional disturbance but the parents have psychological reports stating that the student is severely disturbed and needs residential treatment. You may be asked to reconcile your findings.

If I.Q. is an issue it is good practice to look at the student's whole history of intelligence assessment for the pattern. Your knowledge of test effects (WPPSI vs WISC vs WISC-R vs WAIS vs Binet, etc), practice effects and examiner effects may provide good insight into the whole picture. The same is true of academic progress.

Hearing excerpt 10 is an example of school psychologist testimony comparing recently obtained data with previous reports.

Hearing excerpt 10 - direct examination of a school psychologist by school board attorney

Q In Respondent's exhibit 9, page 3, you compare the WRAT scores that you took, that you have reported in Respondent's Exhibit 3, and you have compared them with January 19 8 testing.

What does the comparison show?

A The comparison shows an improvement of almost four years in word recognition, and a year and some odd months in both spelling and arithmetic.

Q So up to the time that you tested him, had he made academic gains?

A Yes, he did.

It is best to be aware of contradictory test findings. Be prepared to deal with them on the stand. Get copies of any reports to be presented by the parents if the reports are available from the school board attorney. You may find that testing errors or unsupported conclusions are contained therein and can inform the attorney of these matters.

Hearing excerpt 11 illustrates the testimony of a school psychologist disputing findings in an outside psychologist's report. Review of the report and knowledge of proper testing procedures is demonstrated.

Hearing excerpt 11 - direct examination of a school psychologist by school board attorney

Q Another hypothetical question: If (psychologist for parents) in her testing, found on the WISC-R, on the arithmetic section, got what she called a mental age of 17, and reported it that way, do you see any difficulty with that?

A Yes: Wechsler doesn't believe in the concept of mental age, and that is not commonly used when using the WISC-R. The scaled scores are what is commonly used, and we don't usually compare it to a mental age, although there is a page, in the manual, that lists tests' ages compared to scores, but it is not commonly used. I don't know how they would get a mental age of 17 anyway from a scale score of 17.

Q The scale score was 13.

A 13--that is only one standard deviation above the average. That couldn't possibly give him a mental age of five years higher than his actual age.

COORDINATION WITH THE SCHOOL BOARD ATTORNEY

A call from the School Board Attorney is the most likely means of notification that you will be asked to testify in a due process hearing. During your first contact with the attorney you should be made aware of the major issues in the case and, if established, any specifics the attorney wishes to bring out through your testimony.

After you have reviewed the case (as recommended in the previous section) there should be an opportunity for a meeting with the attorney to go over your testimony. This step is important so that the attorney is aware of the evidence you plan to present and so that you both feel comfortable with the proposed flow of the direct examination.

If the attorney takes you through the entire sequence of your direct testimony you will start by giving your background and qualifications. Prepare a current vita so that you can relate your education, work experience, certificates and licenses and other background quickly and completely. This will help the attorney determine the areas of expert witness testimony that you will be asked to present.

Next you will be asked to describe your contacts with the student including the tests you administered, the results and conclusions, observations made and so on. Your chronology and outline will assist in presenting this information concisely and accurately. Make sure that the attorney completely understands your testimony and its ramifications so that the questions you are asked at the hearing allow you to present your material appropriately. This will also make the attorney aware of the information to which you will and will not be able to testify.

Hearing excerpt 12 illustrates the testimony of a school psychologist during direct examination. This testimony was reviewed with the school board attorney in advance. The psychologist was prepared to state why certain tests were selected.

Hearing excerpt 12 - direct examination of a school psychologist by school board attorney

Q What tests did you give him in 1978 and, as long as you are going to review them all for us, how did he do on them?

What was your reason for giving him each of the tests you administered to him?

A Okay. The tests that I administered: One of them was the Wechsler Intelligence Scale for Children - Revised, the WISC-R. I gave him the performance section. I also gave the Leiter International Performance Scale.

These are two measures of intellectual ability. They were chosen specifically due to his communication disorders; and the combination of the Leiter Performance Scale and the Wechsler Intelligence Scale are the best combination of tests to use for hearing impaired and communication disorders. That is why we chose it.

It is very important to discuss any weaknesses that you discovered in reviewing the case. Do not withhold negative information. The opposing side will have access to your records and may have an expert review them. It might be uncomfortable to admit a scoring error to the school board attorney but, at least this can be brought out by you at the hearing with relatively little damage. In this way your professionalism can be retained without an appearance of deceitfulness.

Honestly tell the attorney the conclusions you are willing to state under oath. If a placement committee decision did not follow your recommendation you will need to discuss an agreeable way to state your true feelings while giving recognition to established placement procedures.

Hearing excerpt 13 is another example of a school psychologist under direct examination. This psychologist is knowledgeable in curriculum and willing to express an expert opinion about an appropriate program.

Hearing excerpt 13 - Direct examination of a school psychologist by school board attorney

Q What would you recommend curriculum-wise?

A Well, I believe that the kind of things that he needs, educationally, relating to learning very simple types of things such as his address, such as

basic academic things, including self help skills, are most easily found and most appropriately found within a retardation program such as the EMR program. A low functioning EMR program, I would have to say, but besides that, he needs other elements, as well. He does need to have a continuation of the types of services in terms of behavior management, which seem to have been successful with him.

He needs to have structure, a classroom setting where he can feel secure and continue to make gains in a structured type of setting, as well as having the availability of counseling and other services.

If possible, have the attorney take you through a brief cross examination so that you are prepared for some potential questions. This will allow you to formulate potential answers and will also give the attorney some idea of how you will respond "under fire."

By the time you are called in for your meeting with the attorney the hearing date and time will probably be known. The attorney will inform you, as much is advance as possible, when you are likely to be called. This will help you arrange your calendar in advance. Be aware that past hearings have sometimes gone beyond normal work hours and prepare to stay late if you are called in the afternoon.

ON THE WITNESS STAND

When you receive a subpoena to appear for the hearing you will be asked to bring all your records, reports and files about the student. Also bring with you:

1. Four copies of your resume (if the attorney has already copied this for use as an exhibit you will only need one copy to refer to yourself.)

2. Your chronology and outline. These will be helpful in organizing your presentation and will provide a quick reference during your testimony if you need to refresh your memory.

3. A copy of the questions and responses developed in your meeting with the attorney. Some attorneys will copy their notes, or you may have taken notes for yourself. This information is for you to review prior to being called as a witness. Put these notes away when you enter the hearing room.

Upon entering the hearing room you will find the attorney for the school board, the parents' attorney (if they have hired one), the parents, a representative for the school system, the hearing officer and a court reporter. If the parents have requested an open hearing there may be observers as well. Witnesses will almost always be excluded from the room even in an open hearing.

The hearing officer will swear you in and your testimony will begin with direct questions from the school board attorney, followed by cross examination and follow-up questions or clarifications.

Project sincerity and professionalism

The hearing officer is both judge and jury in due process cases. He/she utilizes the demeanor of witnesses in deciding the weight to be given their testimony. A witness who projects sincerity and professional interest in the student will be given credence. Some suggestions are:

1. Dress in a conservative and business like fashion.

2. Even though you may be nervous, try to avoid obvious signs such as slumping in your chair or avoiding eye contact. A witness who appears relaxed is less likely to be pressured by opposing attorneys.

3. Speak slowly and loud enough to be heard clearly by the hearing officer and court reporter. Don't mumble.

4. Maintain eye contact and speak directly to the hearing officer or the questioner.

5. Report your facts impartially and without a strong appearance of partisanship. Everyone will be aware you are an employee of the school district and that you know the districts' position in the case. Your function is to provide information and expertise to the hearing officer, not to argue the case. When a witness appears overly biased the hearing officer will take that into account when reviewing the testimony and will assign less weight to it.

   "This latter point is related to the issue of credibility of the witness. I have observed the full range of advocacy style from restrained and professional conduct on the one hand to anxious, fierce and angry advocacy on the other hand. Needless to say, the stylistic aspects of witness behavior carry some weight in the judgement of the hearing officer." (Gorlow, 1975, p. 314)

6. Be honest at all times. Not only are you under oath but if you are exposed in a false or exaggerated statement your whole creditabilty will be lost. Do not feel you have to know the answer to every question. If you don't know the answer, say so. Stick to what you actually do recall and avoid speculating when you really don't remember.

7. If the parents themselves are presenting the case there is likely to be a higher degree of emotionalism in the hearing room. Parents are very involved with their cases and they may have formed a negative opinion about various aspects of their child's program or evaluation procedures. They may look upon all witnesses for the school district as enemies.

   Parents may lose their temper, ask antagonistic questions or be abusive. You must avoid taking this personally and losing your temper in return. Self-control is necessary to maintain your professional and unbiased demeanor. The school board attorney and/or hearing officer will intervene if real harassment is evidenced.

   If you are able to remain courteous and polite you will be projecting the image of a professional who is an advocate for the student's best interests. You will also avoid being led into inadvertent responses.

8. Above all, remember that the hearing officer has been asked to make an impartial educational decision based on the presented testimony. Projecting a professional organized, well-prepared image will make this job easier.

Hearing excerpt 14 demonstrates the opposite of the impression a professional should present. The witness resents the expert witness role and is not prepared to explain terminology for the understanding of the hearing officer. This excerpt also provides a clear statement from a hearing officer on his/her role.

Hearing excerpt 14 - Cross examination of a psychiatrist for the parents by a school board attorney

A Well, there are all kinds of depression. There is bipolar, unipolar--

Q What kind?

A Unipolar. Unipolar is a--well, unipolar--Do I really need to go into educating her in what depression is? I mean, what is the purpose of this? I find it very irritating. I find this time after time that I am supposed to be the educator..

Q We are going to show that when the school board approved a residential placement that he was depressed and suicidal, and that's what I want to confirm. If he was fine, then he was, but right now we are not really sure that he was really, and we don't really understand. I think the questions are proper.

Hearing officer: _____, the problem that I am going to have is that I will be charged with issuing a final order in this case, and all that I have before me is the evidence as presented in this hearing...

So, I have not seen (the student). He is not here for me to observe, and I probably couldn't do any kind of job observing if he were here. So, that leaves me with the task of asking you to explain to me what it is that you saw, what prompted your decision, evaluation and recommendations that he be entered or admitted at (the residential placement)

Q Perhaps if we understood in the first place, we wouldn't be here today. So, we are trying to get the facts now.

Maybe if this was really clear to us, this would have been solved a couple of months ago.

A I don't see that it is my job to make anything really clear to you, because this is a medical diagnosis.

Answer questions clearly and without Jargon

If you have prepared your testimony as described in the preparation section of this manual you will have developed explanations of all terms which were used in your reports. This will help you present your findings without jargon and also without "talking down" to the hearing officer.

Hearing excerpt 15 is an example of unclear testimony that was not planned in advance to avoid jargon. It leaves the reader with little understanding of the witness point.

It is important to note that a good deal of the hearing officer's decision will be developed after reading the hearing transcripts. Clearly presented testimony will have a much greater impact in writing than will examples such as excerpt 15.

Hearing excerpt 15 - Cross examination of a psychiatrist for the parents by a school board attorney.

A When I talk of sociopathy, talk of schizophrenia, talk of that kind of illness, each of which he had some category and some degree of maladaption, some degree of severe depression, some degree of primary process, it was not a pure sociopathic, pure schizophrenic, pure neurotic, pure adjustment reaction.

The school psychologist generally has had a lot of experiences explaining terms to parents. This is an advantage at hearings because the hearing officer may have the same degree of knowledge of technical terms as would the typical parent.

Hearing excerpt 16 illustrates a clear explanation presented by a school psychologist.

Hearing excerpt 16 - Direct examination of a school psychologist by a school board attorney.

Q Okay, (school psychologist) let's start with the various testing that you gave him.

Did you give him an intelligence test?

A Yes, I did, Wechsler Intelligence Scale for Children, Revised.

Q How did he do on that?

A His IQ scores were in the average range, and there are 11 subtests that I administered.

Q What do you mean by average? Give the numbers, what they mean.

A Verbal IQ score, 97. His performance IQ and full scale IQ, both 96. Average for children his age is 100. Range between 90 and 110 is considered the average range, so he performed in the middle of the average range.

Answer positively and use explanations when needed

When you are sure of your facts and conclusion it is best to answer questions in a direct and positive manner.

"he met the criteria for learning disabilities placement", is preferable to "If I remember correctly he met the criteria for learning disabilities placement."

"That classroom is definitely appropriate" is preferable to "I guess the classroom is appropriate."

"I observed him three times", is preferable to "I think I observed him three times."

Hearing excerpt 17 illustrates a firm response in defense of the testing procedures utilized.

Hearing excerpt 17 - Cross examination of a school psychologist by attorney for the parents.

Q Are there any other tests in the area of psychology that you feel should be given to this child in order to evaluate his appropriate educational placement?

A I feel that out of the instruments that are available, I picked what I thought would be the most effective combination to get a picture of his functioning, intellectually and emotionally.

Don't answer a question until you are sure it is clear to you. If you are not absolutely sure what is meant ask for clarification. You can ask the attorney to rephrase the question or say you are unsure of what information is being requested.

Many times, cross-examiners ask compound questions. Do not answer a partially untrue question with a yes. When responding to a compound question, divide the question into parts and then answer it. In due process hearings you will rarely be put in a position of having the questioner say "just answer yes or no." If this happens, just state that your response requires an explanation.

You can also take the initiative to rephrase the question or add the qualifiers you feel are needed.

Under cross examination the attorney may deliberately distort your testimony, put words in your mouth or interpret your testimony in an incorrect way in order to reach a specific conclusion. Do not let this go by without correcting it. Some appropriate responses are:

"I think you misheard what I said - "

"You appear to be going beyond what I said - "

"Your interpretation of what I said is incorrect. Let me explain - "

Hearing excerpt 18 illustrates correction of a misinterpreted term.

Hearing excerpt 18 - Direct examination of a school psychologist by a school board attorney

Q You found him essentially stable emotionally with a slight overlay.

Would that be a correct summary considering his --

A I did not say, "emotionally stable."

I said, "emotional overlay."

Q Well, maybe I am paraphrasing it.

What does emotional overlay mean to you in my terms, layman's terms, that you can put to it.

A He appeared to be experiencing some mild emotional adjustment problem.

Hearing excerpt 19 demonstrates a school psychologist clarifying terminology so that a question can be answered accurately.

Hearing excerpt 19 - Direct examination of a school psychologist by a school board attorney.

Q Okay. Then can we draw, from the testimony so far, he is regressing? He is not doing as well as he should be?

A Well, I think there is a difference between saying someone is regressing from saying they are not doing as well as they should be. Regressing means regressing from a point and going backwards, and I don't think we have any evidence of that.

In terms of doing as well as he should be, I think that it is a very individual thing to say, to know exactly how a person should be doing at any particular time. It sounds to me as though he is making progress, and these types of disorders usually are life long disorders. They are not things that go and come very easily. They do take an awful long time, lifelong work.

Hearing excerpt 20 is an example of going beyond the question to adequately explain the response.

Hearing excerpt 20 - Direct testimony of a mental health technician for the parents by the parent's attorney.

Q Earlier I asked you whether (the student) ever appeared suicidal and you said no.

If Dr. _____ had reason to believe that he was suicidal, is it your opinion that Dr. _____ would have told you to watch out for this kind of thing?

A Yes.

Q Did he ever tell you to watch out for suicide attempts?

A No. But let me go one step further.

Suicidal in the sense that he would try to kill himself, I doubt. Suicidal in the sense he might put himself in a situation where he maybe in danger, very possibly. Not in the hospital perhaps but given the opportunity elsewhere such as breaking into somebody's house perhaps who might have a gun, or stealing someone's car, you know, putting himself in jeopardy in that sense, or perhaps socializing with groups of people that, you know, maybe have demonstrated they can be dangerous.

Defend Your Evaluations and Decisions

In a previous part of this section it was stated that the school psychologist should project sincerity and impartiality. On the other hand it is also your responsibility to demonstrate the appropriateness of the techniques and instruments you used as well as the recommendations you made.

If the parents have presented reports, depositions or hearing testimony from outside psychologists you may be asked to respond to opinions which differ from yours. It is always possible to say that another person is entitled to their opinion although you do not change yours; reminding the questioner that the other psychologist tested or observed the student under different circumstances than you did. If you have reviewed the outside testing, you would be wise to prepare to state where you agree and disagree with the evaluation.

Hearing excerpt 21 is an example of a school psychologist responding to the differences between tests given by different evaluators. This excerpt illustrates proper preparation, test knowledge and an ability to relate the tests to the child in uncomplicated terminology.

Hearing excerpt 21 - Direct examination of a school psychologist by a school board attorney

Q Could you compare the key Math to the WRAT? Is that a proper comparison to make?

A No

Q Why not?

A Different tests are administered through different modalities, in that some tests are auditory, some are visual, some are computation, and the nature of the two tests is totally different.

The PIAT combines visual and auditory, in that the student looks at word problems or picture problems in a book, and the examiner reads the problem at the same time so that he is able to look at it and listen to it and respond to it, and many of the choices are multiple choice type things where a student could guess and get the correct answer and not necessarily know it.

Whereas the Wide Range Achievement Test, arithmetic, is strictly a test of computation, and also, (the students') deficit in the area of motor speed might have hampered him in that test in that it is totally a timed test and a motor test where he has to be able to tract--go problem by problem, and he has to do it within a 10-minute time period, so if he has a problem in the area of motor speed, that might slow him down. Not only it might slow him down because he doesn't have the skills to do it, but he just might have the slowness of completing it, where if he has more time, he might have been able to complete more problems than he did.

Much has been said earlier about looking for information which is negative, or which could be taken in a negative light. Hearing excerpt 22 is an example in which a student was recommended for one exceptionality while also meeting criteria for a different one. This possibly confusing situation is directly confronted in the excerpt.

Hearing excerpt 22 - Direct examination of a school psychologist by a school board attorney.

Q Could that be considered a learning disability?

A Yes, it could.

Q Would that be his primary problem?

A No. I believe at the time that I wrote this report, that (the student's) primary problem was his emotional problem.

Q Did you give--

A In addition--do you want me to go on with the other tests on the Detroit?

Q Yes, Go ahead.

A All right. I found other supporting scores. I gave him two different tests of auditory retention and memory, and on both of those, he scored strengths above age level, which would support the findings of the digit span subtest on the WISC, and based on the state and Dade County criteria for placement, we need to find weaknesses and strengths in two different areas, supported on two different instruments, so that (the student) fit into that criteria at that time.

Q Which criteria?

A Academic deficits, significant retardation academically, and deficits in one processing area that are 70 percent below expectancy, and strengths in a different processing area on two different instruments, so that he has motor speed deficits, auditory strengths and academic deficits in spelling and arithmetic.

However, I still felt that the primary problem, although I felt he had a learning disability in that area, that the primary problem was emotional.

Hearing excerpt 23 demonstrates a school psychologist being questioned about a requested observation prior to the hearing. This is an example of meeting "embarrassing" questions with a calm honest demeanor.

Hearing excerpt 23 - Cross examination of a school psychologist by an attorney for the parents

Q Your purpose for seeing him on that day and observing him was specifically to formulate opinions to testify at this hearing; was it not?

A Part of my function in the capacity of a psychologist and supervisor is to oversee the behavioral interventions in the classroom, so that was consistent with my responsibility.

Q Was it just happenstance that your observation took place one week before this hearing?

A No. As I indicated earlier, I was requested to do an observation, as well.

If you are asked if the school district pays your salary, of course you say yes. If asked who you discussed the case with it is perfectly acceptable to state you met with the attorney for a conference. On the other hand, witnesses will generally be asked not to discuss their testimony with each other once the hearing has begun.

Admit your obvious beliefs. Professional opinions and philosophy. If asked how you feel about residential treatment, for example, you can state if you have negative feelings. You may go on to discuss the least restrictive environment and any experiences you might have had. In other words, tie your expressed opinions to a base of experience and educational/ psychological philosophy.

AFTER THE HEARING

After the hearing, both attorneys can submit briefs or recommended orders which will be reviewed along with the hearing transcript

The hearing officer then arrives at a final order. This includes the facts of the case as the hearing officer accepts them, and the decisions on the hearing issues.

Excerpt 24 is taken from the final order in the same case as hearing excerpt 23 (page 26). It shows how the testimony which was presented was utilized by the hearing officer.

Excerpt 24 - Final order.

> (The student) was tested that day prior to being placed in the teacher's classroom. His test scores were consistent with previous testing, placing him in the average range of intellectual functioning. There was a substantial degree of emotional interference in the results, however, causing "significant inter- and intra-test scatter" or failure to answer certain questions at all. Another possible factor retarding his intellectual scores was the presence of a previously undiscovered learning disability in the area of visual processing. His academic performance on the tests showed some improvement from the previous psychological evaluation performed in January, 1978, but his spelling and mathematic scores were significantly retarded. (The school psychologist) felt that the possible learning disability has some relation to the test results, but also felt that (the student's) emotional handicap was his primary problem.

CONCLUSION

The number of due process hearings has been increasing and no school psychologist can be considered exempt from eventually having to testify. Some ideas for good general practice are:

1. Keep good records of all contacts with students and date every observation, conference and evaluation.

2. Think through your test battery with regard to possible biasing factors, language or ethnic standardization problems, validity and reliability. Feel confident you can support each evaluation you do.

3. Avoid scoring errors by a careful checking before your report is written.

4. Thoroughly understand the responsibility of the school district and where it leaves off. Become aware of other agencies which may provide services to families so that your role as a representative of school district does not interfere with one as advocate for the child.

5. Stay current in your knowledge of the District Procedures Document and state department rules and criteria.

6. If you have a case that is confusing or complicated, discuss it with some of your colleagues whose opinions you respect. Get a consensus of opinion on proper procedure or on interpretation.

7. Treat each evaluation with the care you would exercise if you knew it would come to a due process hearing. You never can tell - It might!!

It is hoped that this manual will assist school psychologists to be what Brodsky (1972) calls courtroom-oriented witnesses and what MacDonald (1969) describes as a good mental health witness, "thorough in examination, thoughtful in opinion, careful in answers."

BIBLIOGRAPHY

American Psychological Association, Draft White Paper on P.L. 94-142: Part B, Washington, D.C. APA, 1982

Brodsky, S. L. and Ames, R., On becoming an expert witness: Issues of orientation and effectiveness Prof. Psy. - 1972, 3, 173-76.

Davidson, H. A., Forensic Psychiatry. N.Y. Ronald Press, 1952.

Franzoni, J. B. and Jones, R. W., Implications for school psychology: The challenge of P.L. 94-142. Prof. Psy., 1981, 12, 356-62.

Gorlow, L., The school psychologist as expert witness in due process hearings. J. Sch. Psy., 1975, 13, 311-16.

MacDonald, J. M., The psychiatrist in the witness stand, in MacDonald, J. M., Psychiatry and the Criminal, Sec. ed. Springfield, Ill., Thomas, 1969.

McCary, J. L. The psychologist as an expert witness in court, Am. Psy., 1956, 11, 8-13.

Pacht, A. R., et. al. The current status of the psychologist as an expert witness, Prof. Psy., 1973, 4, 409-13.

Poythress, N. G., Coping on the witness stand: Learned Responses to "Learned Treatises". Prof. Psy., 80, 11, 139-149.

Shrybman, J. A., Due Process in Special Education, Rockville, Md., Aspen Systems, 1982.

Slenkovich, Jane E., The Easy Way to Win Special Education Hearings, Cupertino, Ca., Slenkovich Enterprises, 1982.

State of Florida, A Resource Manual for the Development and Evaluation of Special Programs for Exceptional Students, Volume III-C: Mediation and Due Process Procedures, Tallahassee, State of Florida, Dept. of Ed., 1982.

Whitaker, L. C., Psychological test evaluation, in MacDonald, J. M., Psychiatry and the Criminal, sec. ed., Springfield, Ill., Thomas, 1969.

Ziskin, J. Coping with Psychiatric and Psychological testimony - third ed., Vol. 1, Vol. II, Venice, Calif., Law and Press, 1981.